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No. 95-293

In The
Supreme Court of the United States

October Term, 1995

PERCY A. GREGORY, JR.,
Petitioner,

v.

ELECTRICAL WORKERS LOCAL 58
PENSION TRUST FUND, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

AND APPENDIX

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I.

WAS THE COURT OF APPEALS' AFFIRMANCE OF THE DISTRICT COURT'S GRANT OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND DENIAL OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT CONSISTENT WITH THE DECISIONS OF THIS COURT AND ALL OTHER COURTS OF APPEALS?

Respondents Answer "Yes".

PARTIES TO THE PROCEEDING

The parties to this proceeding are Percy A. Gregory, Jr., Petitioner and plaintiff-appellant below, appearing pro-se, and the Electrical Workers Pension Trust Fund of Local No. 58, I.B.E.W. and the IBEW Local No. 58 Annuity Fund, Respondents and defendants-appellees below, which are represented by Sachs, Waldman, O'Hare, Helveston, Hodges & Barnes, P.C., by Ann E. Neydon (Counsel of Record).

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RESPONDENTS' BRIEF IN OPPOSITION

CITATIONS OF OPINIONS BELOW

The Orders and Opinions delivered in the courts below are reproduced in the Appendix to Petitioner's Petition for Writ of Certiorari and are as follows:

1. Memorandum and Order in *Percy A. Gregory, Jr.* v *William Dellapa for Electrical Workers Pension Fund of Local 58, I.B.E.W., Detroit, Michigan*, No. 93-74453 (E.D. Mich., S.D. June 30, 1994).

2. Order in *Percy A. Gregory* v *Electrical Workers Local 58 Pension Trust Fund; Local 58, International Brotherhood of Electrical Workers*, No. 94-1858 (6th Cir. April 20, 1995).

3. Order in *Percy A. Gregory* v *Electrical Workers Local 58 Pension Trust Fund, et al.*, No. 94-1850 (6th Cir. June 14, 1995).

STATUTES INVOLVED

Respondents call to the Court's attention the following statutory provisions upon which the Respondents relied in defending this action. They are reproduced in their entirety in the Appendix to this Brief.

26 USC § 401(a)(31)
26 USC § 402(c)(4)
26 USC § 402(f)
26 USC § 3402(n)
26 USC § 3403
26 USC § 3405(a)
26 USC § 3405(c)
26 USC § 3405(f)
26 USC § 6332(e)
26 USC § 7422(f)(1)
44 USC § 3512

STATEMENT OF THE CASE

A. The Pension Fund Is Served With An IRS Notice Of Levy On Benefits Payable To The Petitioner And Complies Therewith.

Petitioner Percy A. Gregory, Jr., is a participant in the Electrical Workers Pension Trust Fund of Local No. 58, I.B.E.W. (hereinafter Pension Fund), a defined benefit pension plan.

On April 6, 1993, the Internal Revenue Service (hereinafter IRS) served the Pension Fund's attorneys and designated agent for service of legal process with a Notice of Levy on Pension Fund benefits payable to the Petitioner. The Levy attached to benefits payable pursuant to Petitioner's then-pending application for disability retirement benefits. On July 21, 1993, the Pension Fund's Trustees approved that application, retroactive to February 1, 1993.

Part 3 of the Notice of Levy, the Statement of Exemptions and Filing Status, was then sent to the Petitioner by the Pension Fund's attorney. Petitioner refused to complete that Part 3, so the Pension Fund, in accordance with IRS instructions, calculated the portion of Petitioner's first benefit payment (which included retroactive benefit payments for the months February through August, 1993) that was exempt from levy as if Petitioner were a married individual, filing separately and having only the personal exemption.

The Pension Fund paid $4,836.55 of Petitioner's initial benefit payment of $8,015.84 to the IRS and paid the balance, $3,179.19, to Petitioner.

B. The Annuity Fund Withholds Twenty Percent Of Petitioner's Lump Sum Benefit.

Petitioner was a participant in the I.B.E.W. Local No. 58 Annuity Fund (hereinafter Annuity Fund), a defined contribution pension plan. On August 9, 1993, he filed an application for benefits with the Annuity Fund and elected to have the benefits paid in a Lump Sum.

Pursuant to Internal Revenue Code (hereinafter Code) Sections 401(a)(31) and 402(f), and the regulations thereunder, the Annuity Fund provided Petitioner with an explanation of his options to (1) "roll over" his entire lump sum payment into an individual retirement account or annuity or into another qualified plan which accepts rollovers, or (2) have 80% of his benefit paid directly to him and 20% paid to the Internal Revenue Service as income tax withholding. Petitioner did not elect to have his benefit paid as a direct rollover, so, on September 1, 1993, pursuant to and in compliance with Internal Revenue Code § 3405(c), the Annuity Fund paid $4,816.17, which was 80% of Gregory's total benefit of $6,020.21, to Gregory and $1,204.04, which was 20% of Gregory's total benefit, to IRS as federal income tax withholding.

C. Petitioner Files Suit Against The Pension Fund And The Annuity Fund.

Petitioner filed a Complaint in Oakland County (Michigan) Circuit Court on October 1, 1993, which consisted of a recital of events and a demand for relief, but no specific allegations. He demanded $6,040.69[1] plus interest and costs, punitive damages of $100,000 "Tax Free" and "a Permanent Injunction against further interference with the plaintiff's arguments and contentions with the IRS from plaintiff's [*sic*] Pension Trust Fund and Annuity Fund."

On October 21, 1993, the Pension Fund and the Annuity Fund removed the action to the United States District Court, Eastern District of Michigan, Southern Division because Petitioner's claims arose under 29 USC § 1132(a)(1)(B).

On October 27, 1993, Respondents filed their Answer to Complaint. On November 15, 1993, Petitioner filed "Plaintiff's Counter Claim to Defendants' Answer to Complaint", in which he set forth the bases of his claims against Respondents, that (1) he is not liable for income tax, (2) the IRS levy procedure is legally deficient and (3) the Pension Fund is not immune from suit.

On December 22, 1993, Respondents filed their Motion for Summary Judgment, and on January 4, 1994, Petitioner filed his Motion for Summary Judgment.

Oral argument was heard by the District Court on June 29, 1994. The District Court granted Respondents' Motion for Summary Judgment and denied Petitioner's Motion for Summary Judgment in its Judgment and Memorandum and Order entered June 30, 1994. The District Court held that:

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[1] **The $6,040.69 demanded in the Complaint represents the $4,836.65 attached from Petitioner's Pension Fund benefit by the IRS Notice of Levy and the $1,204.04 paid from his Annuity Fund benefit for federal income tax withholding.**

- The Pension Fund is immune from suit under 26 USC § 6332(e) for its compliance with an IRS Notice of Levy,
- The Annuity Fund is immune from suit under 26 USC § 3403 for its compliance with the withholding provisions of 26 USC § 3405,
- Petitioner failed to state any claim for which relief may be granted under 26 USC § 3402(n), and
- Petitioner's suit for recovery of any federal income taxes alleged to have been erroneously or illegally assessed or collected may be brought only against the United States, pursuant to 26 USC § 7422(f)(1).[2]

On July 29, 1994, Petitioner appealed the District Court's Judgment to the Court of Appeals for the Sixth Circuit. The Court of Appeals, without oral argument, affirmed the Judgment of the District Court and held that:

- Summary judgment was properly granted to Respondents by the District Court as there was no genuine issue as to any material fact and Respondents were entitled to judgment as a matter of law,
- The District Court properly concluded that Respondents were immune from suit in this matter, and
- Petitioner's exclusive remedy is an action against the United States.

---

[2] The Court also held Petitioner is not barred by the doctrines of Res Judicata or Collateral Estoppel from relitigating the issues of immunity, and those relating to the legality of the Levy procedure determined by the District Court in Case No. 90-70572 and affirmed on appeal in the Court of Appeals for the Sixth Circuit Court, Case No. 91-1232, which holdings Respondents did not appeal.

On May 4, 1995, Petitioner filed a Petition for Rehearing En Banc with the Court of Appeals for the Sixth Circuit, which petition was denied on June 14, 1995.

On August 24, 1995, Respondents received Petitioner's Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

Petitioner seeks relief from respondent Pension Fund based upon its compliance with an IRS levy on his pension benefits and from Respondent Annuity Fund based on its compliance with Internal Revenue Code provisions on mandatory federal tax withholding from lump sum benefits.

The District Court held that both Respondents are immune as a matter of statutory law from suit based on their compliance with the IRS Levy and the Code and that Petitioner's legal remedy is a suit against the United States. The Court of Appeals for the Sixth Circuit affirmed.

The Sixth Circuit's decision was in accord with all decisions of that court, all decisions of other United States courts of appeals and all decisions of this Court which have considered the questions raised by Petitioner.

Thus, Petitioner has failed to establish a basis for review by this Court.

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT'S HOLDING THAT RESPONDENT PENSION FUND IS IMMUNE FROM SUIT FOR ITS COMPLIANCE WITH AN IRS NOTICE OF LEVY IS CONSISTENT WITH EVERY DECISION OF THIS COURT AND ALL LOWER COURTS.

Persons complying with an IRS Notice of Levy under 26 USC § 6331 are immune under 26 USC § 6332(e) from liability for any claim arising out of the levy:

> (e) **Effect of honoring levy.** Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary, surrenders such property or rights to property (or discharges such obligation) to the Secretary (or who pays a liability under subsection (d)(1)) shall be discharged from any obligation or liability to the delinquent taxpayer and any other person with respect to such property or rights to property arising from such surrender or payment.

The validity and applicability of this Section is unquestioned. *State Bank of Fraser* v *U.S.*, 861 F.2d 954 (6th Cir. 1988) at 958, citing *United States* v *National Bank of Commerce*, 472 U.S. 713 (1985); *Burroughs* v *Wallingford*, 780 F.2d 502 (5th Cir. 1986); *Commonwealth of Kentucky* v *Laurel County*, 805 F.2d 628, 635 (6th Cir. 1986), *cert. denied*, 484 U.S. 817, 818 (1987); *In re Sigmund London, Inc.*, 139 B.R. 765 (Bankr., E.D. N.Y. 1992).

The District Court held that the Pension Fund acted properly in complying with the IRS Notice of Levy and, pursuant to 26 USC § 6332(e), is immune from suit.

Petitioner argues that the immunity of 26 USC § 6332(e) is conferred only upon those complying

with a Levy, which he seeks to distinguish from a Notice of Levy. There is no basis in the law for that distinction.

This Court held in *Phelps* v *United States*, 421 U.S. 330 (1975), that service of a Notice of Levy is sufficient to levy on a taxpayer's property:

> Treasury Regulations, 26 CFR 301.6331-1(a)(1) (1974) provide that a "[l]evy may be made by serving a *notice of levy*," and that levy gave the United States the right to the proceeds.

(emphasis added) *Phelps*, 421 U.S. at 335, and held that

> Historically, service of notice has been sufficient to seize a debt, . . . and notice of levy and demand are equivalent to seizure.

(*Phelps*, 421 U.S. at 337).

A taxpayer making the same argument made by Petitioner here was assessed Rule 11 sanctions in *Pawlowske* v *Chrysler Corp.*, 623 F. Supp. 569 (DC Il 1985), *aff'd*, 799 F.2d 753 (7th Cir. 1986), in which the court cited *Phelps* and other cases in pointing out the frivolity of the taxpayer's claim:

> [N]umerous cases make clear that a Notice of Levy is all that is required for the IRS to gain possession of the property . . . See *In re Chicagoland Ideel Cleaners, Inc.*, 495 F.2d 1283, 1285 (7th Cir. 1974), aff'd sub nom. *Phelps* v *United States*, 421 U.S. 330, 335-37, 95 S.Ct. 1728, 1731-32, 44 L.Ed.2d 201 (1975) ("notice of levy and demand are equivalent to seizure"); *United States* v *Pittman*, 449 F.2d 623, 627 (7th Cir. 1971); *Rosenblum* v *United States*, 300 F.2d 843, 844-45 (1st Cir. 1962); *United States* v *Eiland*, 223 F.2d 118, 121 (4th Cir. 1955). The cases plaintiff relies upon to argue that more than a notice of levy is required were decided under a version of the statute that was replaced in 1954 with significantly different lan-

> guage, and the cases just cited make clear that plaintiff's cases are no longer good law. See 495 F.2d at 1285; 449 F.2d at 627 and n. 3; and 300 F.2d at 845.

Pawlowske, 623 F. Supp. at 570-571.

Thus, Petitioner's attempt to defeat the immunity conferred on the Pension Fund by 26 USC § 6332(e) must fail, as its basis has been repeatedly and universally rejected by the courts.

Petitioner attacks the validity of the Notice of Levy, claiming (1) that "liability" for tax is somehow lacking; (2) that 26 USC § 6331 applies only to certain federal employees; (3) that service of a Notice of Levy is insufficient to levy on property; and (4) that the Notice of Levy lacked numerical designation from the Office of Management and Budget, a point raised improperly for the first time on appeal. *Brickner* v *Voinovich*, 977 F.2d 235 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 2965 (1993). Each of these attacks is baseless and had been repeatedly and universally rejected.

Petitioner's claim regarding the legal sufficiency of the levy procedure provided for in 26 USC § 6331 is a stale one. *State Bank of Fraser* v *United States*, 861 F.2d 954, 957-958 (6th Cir. 1988), citing *United States* v *National Bank of Commerce*, 472 U.S. 713 (1985); *Christensen* v *U.S.*, 733 F. Supp. 844 (D.N.J. 1990), *aff'd*, 925 F.2d 416 (3rd Cir. 1991). In *United States* v *Pilla*, 550 F.2d 1085, 1092 (8th Cir. 1977), the Court stated:

> The defendant's argument boils down to the proposition that 26 USC § 6331 is unconstitutional because it permits a seizure of property without prior judicial proceedings. That argument has been out of date since the Supreme Court decided *Phillips* v *Commissioner of Internal Revenue*, 283 U.S. 589, 51 S. Ct. 608, 75 L. Ed. 1289 (1931), more than forty-five years ago. See *Fuentes* v *Shevin*, 407 U.S. 67, 90-92, 92 S. Ct. 1983, 32 L. Ed.

> 2d 556 (1972); *Kalb* v *United States*, 505 F.2d 506, 510 (2d Cir. 1974); and *Tavares* v *United States*, 491 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 925, 95 S. Ct. 1120, 43 L. Ed. 2d 394 (1975).

See also *Baddour, Inc.* v *United States*, 802 F.2d 801, at 807 (5th Cir. 1986); *Ginter* v *Southern*, 611 F.2d 1226, at 1228 (8th Cir. 1979), *cert. denied*, 446 U.S. 967 (1980); *Abel* v *Campbell*, 334 F.2d 339, at 342 (5th Cir. 1964), addressing the constitutionality of the levy procedure against a variety of challenges.

Petitioner's argument that 26 USC § 6331 only applies to certain federal employees is also stale. This Court rejected that argument in 1959 in *Sims* v *United States*, 359 U.S. 108 (1959), in which a taxpayer argued that the specific reference in § 6331(a) to a Notice of Levy on federal employees evidenced an intent to *exclude* other persons from the § 6331 Notice of Levy procedure. The Court held that that specific reference in § 6331 was intended to make the levy procedure, *already* applicable to non-federal employees, applicable to federal employees:

> "It is evident that § 6331 was enacted . . . to subject the salaries of federal employees to the *same collection procedures as are available against all other taxpayers* . . ."

(emphasis added) *Sims*, 359 U.S. at 113.

The *Pawlowske* decision cited above, in which Rule 11 sanctions were assessed against a taxpayer raising precisely the claims Petitioner raises here, relied on *Sims:*

> Plaintiff also argues that because § 6331 specifically states a notice of levy is sufficient to "make" a levy on the salary of a federal or District of Columbia employee, serving a notice levy is *not* sufficient to "make" a levy on the salary of a private sector employee. That same argument was clearly rejected in *Sims* v *United States*,

Pawlowske, 623 F. Supp. at 571.

Petitioner's attempt to distinguish a Levy from a Notice of Levy has no more validity as an attack on the Notice of Levy itself than it does as an attack on the immunity conferred by 26 USC 6332(e).

Petitioner raised for the first time on appeal the argument that lack of an O.M.B. number invalidates the Notice of Levy. This same argument was rejected in *Lonsdale* v *U.S.*, 919 F.2d 1440, 1444 (10th Cir. 1990), which held that IRS levies without an O.M.B. number do not violate 44 USC § 3512 because that chapter does not apply to collection of information during the conduct of an administrative action or investigation involving an agency against specific individuals or entities. Also see *U.S.* v *Collins*, 920 F.2d 619, 630, fn 12 (10th Cir. 1990), *cert denied*, 500 U.S. 920 (1991), affirming the continued validity of *Lonsdale* in light of *Dole* v *United Steelworkers of America*, 494 U.S. 26, 33 (1990).

Finally, Petitioner confuses his arguments regarding the withholding provisions of the Code with its levy provisions. Petitioner's failure to complete Parts 3 and 4 of the IRS Notice of Levy required the Pension Fund to calculate the amount exempt from levy as if he were married and filing separately with only the personal exemption. His "elect(ion) not to have income tax withheld from (his) Pension and Annuity" is irrelevant for this purpose.

Each and every one of Petitioner's claims can be brought only against IRS, as the District Court held and the Court of Appeals for the Sixth Circuit affirmed.

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II.

THE DISTRICT COURT'S HOLDING THAT RESPONDENT ANNUITY FUND IS IMMUNE FROM SUIT FOR ITS COMPLIANCE WITH THE WITHHOLDING PROVISIONS OF THE INTERNAL REVENUE CODE IS CONSISTENT WITH EVERY DECISION OF THIS COURT AND ALL LOWER COURTS.

Section 3405(f) of Title 26 provides that for other purposes (i.e., those not expressly addressed in subsection (a) through (e) of that Section), distributions from pension plans are to be treated as wages with respect to the withholding provisions of Chapter 24 of Title 26, Collection of Income Tax at Source on Wages. Accordingly, 26 USC § 3403, Liability for Tax, applies to respondent Annuity Fund:

> § 3403. **Liability for tax.**
>
> The employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter, and shall not be liable to any person for the amount of any such payment.

In *Edgar* v *Inland Steel Co.*, 744 F.2d 1276, 1278 (7th Cir. 1984), the Court held, pursuant to 26 USC § 3403, that employees have no cause of action against employers to recover wages withheld and paid over to the government in satisfaction of federal income tax liability. This view has prevailed in all courts which have considered the issue. *Beerbower* v *U.S.*, 592 F. Supp. 67, 68 (E.D. Mich S.D. 1984), *aff'd*, 787 F.2d 588 (6th Cir. 1986); *Pascoe* v *IRS*, 580 F. Supp. 649, 654 (E.D. Mich S.D. 1984), *aff'd*, 755 F.2d 932 (6th Cir. 1985); *Press* v *McNeal*, 568 F. Supp. 256, 259 (E.D. Pa 1983); *Chandler* v *Perini*, 520 F. Supp. 1152, 1156 (D.N.H. 1981); *Wise* v *Commissioner of IRS*, 624 F. Supp. 1124, 1129 (D. Mont 1986); *Peth* v *Breitzmann*, 611 F. Supp. 50, 54 (D.C. Wis. 1985).

Petitioner's claims against the Annuity Fund arise from its compliance with the withholding provisions of the Code and are, under the authority cited above, barred by the immunity provisions of 26 USC § 3403.

Pages 4 and 5 of the Petition are directed in various ways to this aspect of the District Court's decision. Each point was argued in the lower court, which held that there was no basis for suit against the Annuity Fund. These arguments reflect Petitioner's failure to understand the operation of 26 USC § 3405(c), which provides for a *mandatory* 20% withholding from an eligible rollover distribution which is *not* paid directly into another pension plan or individual retirement account.

The Unemployment Compensation Amendments of 1992, Public Law 102-318, Section 522(b), amended the withholding requirements of 26 USC § 3405 by adding, *inter alia*, the following text:

> **(c) Eligible rollover distributions.**
>
> **(1) In general.** In the case of any designated distribution which is an eligible rollover distribution
>
> (A) subsections (a) and (b) shall not apply, and
>
> (B) the payor of such distribution shall withhold from such distribution an amount equal to 20 percent of such distribution.
>
> **(2) Exception.** Paragraph (1)(B) shall not apply to any distribution if the distributee elects under section 401(a)(31)(A) to have such distribution paid directly to an eligible retirement plan.
>
> **(3) Eligible rollover distribution.** For purposes of this subsection, the term "eligible rollover distribution" has the meaning given such term by section 402(f)(2)(A) (or in the case of an annuity contract under section 403(b), a distribution from such contract described in section 402(f)(2)(A)).

Section 402(f)(2)(A) of Title 26 defines "eligible rollover distribution" as having the same meaning, for these purposes, as 26 USC § 402(c)(4), which states:

> **(4) Eligible rollover distribution.** For purposes of this subsection, the term "eligible rollover distribution" means any distribution to an employee of all or any portion of the balance to the credit of the employee in a qualified trust; except that such term shall not include
>
> (A) any distribution which is one of a series of substantially equal periodic payments (not less frequently than annually) made
>
> (i) for the life (or life expectancy) of the employee or the joint lives (or joint life expectancies) of the employee and the employee's designated beneficiary, or
>
> (ii) for a specified period of 10 years or more, and
>
> (B) any distribution to the extent such distribution is required under section 401(a)(9).

Under the Code's definition, the Annuity Fund's lump sum cash payment to Petitioner of his account balance was an eligible rollover distribution. The Annuity Fund sent Petitioner all of the information which the Code requires to be provided to the recipient of an eligible rollover distribution. Petitioner did not elect to have his eligible rollover distribution, the lump sum cash benefit, rolled over directly into an individual retirement account, individual retirement annuity or another qualified retirement plan, as was his option. Accordingly, the Annuity Fund, as payor of the eligible rollover distribu-

tion, withheld 20% of the lump sum benefit for federal income tax pursuant to 26 USC § 3405(c), *supra*.

Petitioner alleges that the Annuity Fund was bound by the IRS Form W-4P, Withholding Certificate for Pension or Annuity Payment, which he filed with the Fund in October, 1993, electing not to have federal income taxes withheld from his benefit payment. Section 3405(c)(1)(A) of Title 26, however, specifically provides that "subsections (a) and (b) shall not apply" in the case of an eligible rollover distribution such as the lump sum cash payment which Petitioner applied for and received from the Annuity Fund. Subsection (a) of 26 USC § 3405 states:

> **(a) Periodic payments.**
>
> (1) **Withholding as if payment were wages.** The payor of any periodic payment (as defined in subsection (e)(2)) shall withhold from such payment the amount which would be required to be withheld from such payment if such payment were a payment of wages by an employer to an employee for the appropriate payroll period.
>
> (2) **Election of no withholding.** An individual may elect to have paragraph (1) not apply with respect to periodic payments made to such individual. Such an election shall remain in effect until revoked by such individual.
>
> (3) **When election takes effect.** Any election under this subsection (and any revocation of such an election) shall take effect as provided by subsection (f)(3) of section 3402 for withholding exemption certificates.
>
> (4) **Amount withheld where no withholding exemption certificate in effect.**

> In the case of any payment with respect to which a withholding exemption certificate is not in effect, the amount withheld under paragraph (1) shall be determined by treating the payee as a married individual claiming 3 withholding exemptions.

Under 26 USC § 3405(c), 20% of any benefit payment which is an eligible rollover distribution but which the recipient chooses not to roll over directly is to be withheld for federal income tax *without* regard to any withholding exemption certificate filed by the recipient.

The District Court correctly held (and the Court of Appeals for the Sixth Circuit affirmed) that in light of 26 USC § 3405(c)(1)(A), Petitioner simply did not have the right to make an election such as that in his "Affidavit Letter", that respondent Annuity Fund properly withheld 20% of his distribution in compliance with this section and that it is immune from liability for so doing.

III.

THE DISTRICT COURT'S HOLDING THAT 26 USC § 3402(n) PROVIDES PETITIONER WITH NO PRIVATE CAUSE OF ACTION AGAINST RESPONDENT ANNUITY FUND IS CONSISTENT WITH EVERY DECISION OF THIS COURT AND ALL LOWER COURTS.

Petitioner challenges the District Court's holding that "in as much as Gregory's claim rests on 26 USC § 3402(n), his claim is without merit".

In *Pascoe* v *IRS*, 580 F. Supp. 649, 654 (E.D. Mich 1984), *aff'd*, 755 F.2d 932 (6th Cir. 1985), the Court held that 26 USC § 3402(n) governs the relationship between the employer and the IRS, and forms no basis for a claim by the taxpayer against his employer.

This portion of the Petition is a repetition of Petitioner's claims based on his "Affidavit Letter", which

were discussed above. The District Court's holding on this point was fully supported by statute and case law and the Court of Appeals properly affirmed.

IV.

THE DISTRICT COURT'S HOLDING THAT A SUIT FOR RECOVERY OF FEDERAL INCOME TAX ALLEGED TO HAVE BEEN WRONGFULLY ASSESSED MAY BE BROUGHT ONLY AGAINST THE UNITED STATES IS CONSISTENT WITH EVERY DECISION OF THIS COURT AND ALL LOWER COURTS.

It is well settled that a taxpayer's proper and exclusive remedy for alleged issuance and service of wrongful tax levy is to file a claim with the Internal Revenue Service for a refund. *Jackman* v *D'Agostino*, 669 F. Supp. 43, 46 (D. Conn. 1987). The rights of a taxpayer whose property has been subject to levy are set forth in the Internal Revenue Code, *In re Sigmund London, Inc.*, 139 B.R. 765 (Bankr., E.D. N.Y., 1992), and a suit or proceeding for recovery of any federal tax alleged to have been assessed or collected erroneously or illegally may be maintained *only* against the United States. 26 USC § 7422(f)(1). In *Burroughs* v *Wallingford*, 780 F.2d 502, 503 (5th Cir. 1986), the Court held that challenges to IRS levies "are properly considered in a suit against the IRS and not against (those who comply with the levies)." In *Burda* v *M. Ecker Co.*, 954 F.2d 434, 439 (7th Cir. 1992), the court affirmed dismissal of a claim based upon a challenge to the income tax withholding regulations by stating that the exclusive remedy provision of 26 USC § 7422 merits the grant of a motion under Fed. R. Civ. P. 12(b)(6) to dismiss for failure to state a claim.

V.

THE DISTRICT COURT'S RESOLUTION OF PETITIONER'S ACTION BY SUMMARY JUDGMENT WAS PROPER AND CONSISTENT WITH THE FEDERAL RULES OF CIVIL PROCEDURE.

Petitioner improperly argues for the first time in his Petition's "Questions Presented" that he was denied a constitutionally protected right to a jury trial in this matter. This issue is not mentioned or argued elsewhere in the Petition. Petitioner himself filed a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, which motion was denied. Petitioner's untimely challenge to the legality, propriety or constitutionality of Rule 56 and its application in this matter should be deemed to have been waived by his *own* use of the Rule. This point cannot form the basis for a review of the District Court's decision as affirmed by the Court of Appeals for the Sixth Circuit and Petitioner's Petition for Writ of Certiorari should be denied.

CONCLUSION

Based upon the arguments advanced above, and the record as a whole, Respondents respectfully request that this Court deny Petitioner's request for a Writ of Certiorari.

Respectfully submitted,

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Dated: September 22, 1995

APPENDIX TO BRIEF IN OPPOSITION

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STATUTES INVOLVED

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26 USC § 401(a)(31)

(31) Optional direct transfer of eligible rollover distributions.

(A) In general. A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that if the distributee of any eligible rollover distribution

(i) elects to have such distribution paid directly to an eligible retirement plan, and

(ii) specifies the eligible retirement plan to which such distribution is to be paid (in such form and at such time as the plan administrator may prescribe), such distribution shall be made in the form of a direct trustee-to-trustee transfer to the eligible retirement plan so specified.

(B) Limitation. Subparagraph (A) shall apply only to the extent that the eligible rollover distribution would be includible in gross income if not transferred as provided in subparagraph (A) (determined without regard to sections 402(c) and 403(a)(4)).

(C) Eligible rollover distribution. For purposes of this paragraph, the term "eligible rollover distribution" has the meaning given such term by section 402(f)(2)(A).

(D) Eligible retirement plan. For purposes of this paragraph, the term "eligible retirement plan"

has the meaning given such term by section 402(c)(8)(B), except that a qualified trust shall be considered an eligible retirement plan only if it is a defined contribution plan, the terms of which permit the acceptance of rollover distributions.

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26 USC § 402(c)(4)

(4) Eligible rollover distribution. For purposes of this subsection, the term "eligible rollover distribution" means any distribution to an employee of all or any portion of the balance to the credit of the employee in a qualified trust; except that such term shall not include

(A) any distribution which is one of a series of substantially equal periodic payments (not less frequently than annually) made

(i) for the life (or life expectancy) of the employee or the joint lives (or joint life expectancies) of the employee and the employee's designated beneficiary, or

(ii) for a specified period of 10 years or more, and

(B) any distribution to the extent such distribution is required under section 401(a)(9).

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26 USC § 402(f)

(f) Written Explanation to Recipients of Distributions Eligible for Rollover Treatment.

(1) In general. The plan administrator of any plan shall, within a reasonable period of time before making an eligible rollover distribution from an

eligible retirement plan, provide a written explanation to the recipient

(A) of the provisions under which the recipient may have the distribution directly transferred to another eligible retirement plan,

(B) of the provision which requires the withholding of tax on the distribution if it is not directly transferred to another eligible retirement plan,

(C) of the provisions under which the distribution will not be subject to tax if transferred to an eligible retirement plan within 60 days after the date on which the recipient received the distribution, and

(D) if applicable, of the provisions of subsections (d) and (e) of this section.

(2) Definitions. For purposes of this subsection.

(A) Eligible rollover distribution. The term "eligible rollover distribution" has the same meaning as when used in subsection (c) of this section or paragraph (4) of section 403(a).

(B) Eligible retirement plan. The term "eligible retirement plan" has the meaning given such term by subsection (c)(8)(B).

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26 USC § 3402(n)

(n) Employees incurring no income tax liability. Notwithstanding any other provision of this section, an employer shall not be required to deduct and withhold any tax under this chapter upon a payment of wages to an employee if there is in effect with respect to such payment a withholding exemption certificate (in such form and containing such other information as the Sec-

tion may prescribe) furnished to the employer by the employee certifying that the employee

(1) incurred no liability for income tax imposed under subtitle A for his preceding taxable year, and

(2) anticipates that he will incur no liability for income tax imposed under subtitle A for his current taxable year.

The Secretary shall by regulations provide for the coordination of the provisions of this subsection with the provisions of subsection (f).

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26 USC § 3403

The employer shall be liable for payment of the tax required to be deducted and withheld under this chapter, and shall not be liable to any person for the amount of any such payment.

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26 USC § 3405(a)

(a) Periodic payments.

(1) **Withholding as if payment were wages.** The payor of any periodic payment (as defined in subsection (e)(2)) shall withhold from such payment the amount which would be required to be withheld from such payment if such payment were a payment of wages by an employer to an employee for the appropriate payroll period.

(2) **Election of no withholding.** An individual may elect to have paragraph (1) not apply with respect to periodic payments made to such individual. Such an election shall remain in effect until revoked by such individual.

(3) **When election takes effect.** Any election under this subsection (and any revocation of such an election) shall take effect as provided by subsection (f)(3) of section 3402 for withholding exemption certificates.

(4) **Amount withheld where no withholding exemption certificate in effect.** In the case of any payment with respect to which a withholding exemption certificate is not in effect, the amount withheld under paragraph (1) shall be determined by treating the payee as a married individual claiming 3 withholding exemptions.

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26 USC § 3405(c)

(c) Eligible rollover distributions.

(1) In general. In the case of any designated distribution which is an eligible rollover distribution

(A) subsections (a) and (b) shall not apply, and

(B) the payor of such distribution shall withhold from such distribution an amount equal to 20 percent of such distribution.

(2) Exception. Paragraph (1)(B) shall not apply to any distribution if the distributee elects under section 401(a)(31)(A) to have such distribution paid directly to an eligible retirement plan.

(3) Eligible rollover distribution. For purposes of this subsection, the term "eligible rollover distribution" has the meaning given such term by section 402(f)(2)(A) (or in the case of an annuity contract under section 403(b), a distribution from such contract described in section 402(f)(2)(A)).

26 USC § 3405(f)

(f) Withholding To Be Treated as Wage Withholding Under Section 3402 for Other Purposes. For purposes of this chapter (and so much of subtitle F as relates to this chapter).

(1) any designated distribution (whether or not an election under this section applies to such distribution) shall be treated as if it were wages paid by an employer to an employee with respect to which there has been withholding under section 3402, and

(2) in the case of any designated distribution not subject to withholding under this section by reason of an election under this section, the amount withheld shall be treated as zero.

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26 USC § 6332(e)

(e) **Effect of honoring levy.** Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary, surrenders such property or rights to property (or discharges such obligation) to the Secretary (or who pays a liability under subsection (d)(1)) shall be discharged from any obligation or liability to the delinquent taxpayer and any other person with respect to such property or rights to property arising from such surrender or payment.

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26 USC § 7422(f)(1)

(f) Limitation on right of action for refund.

(1) General rule. A suit or proceeding referred to in subsection (a) may be maintained only

against the United States and not against any officer or employee of the United States (or former officer or employee) or his personal representative. Such suit or proceeding may be maintained against the United States notwithstanding the provisions of section 2502 of title 28 of the United States Code (relating to aliens' privilege to sue) and notwithstanding the provisions of section 1502 of such title 28 (relating to certain treaty cases).

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44 USC § 3512

Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter.